Jaya Medical Consultants Sdn Bhd v Island & Peninsular Bhd & Ors

HIGH COURT (KUALA LUMPUR) — PETITION NO D4-42-132-87
SITI NORMA YAAKOB J
4 NOVEMBER 1993

Companies and Corporations *— Members' rights — Minority shareholders — Action brought s 181(1) of the Companies Act 1965 — Whether there was 'oppression' and 'disregard' under s 181(1)(a) of the Companies Act 1965 or 'prejudice' or 'unfair discrimination' within s 181(1)(b) of the Companies Act 1965 — Companies Act 1965 s 181(1)(a) & (b)*

Companies and Corporations *— Members' rights — Breach of fiduciary duty — Petitioner's complaint that several companies of which the second and third respondents had vested interests were awarded contracts under the project rendering those contracts highly improper and unfairly prejudicial to the petitioner*

Companies and Corporations *— Directors — Breach of company procedure — Action outside scope of director's authority — Not oppressive or unfairly prejudicial to the petitioner as the breach committed was a personal act of director and not a wrong attributable to the company*

Companies and Corporations *— Meetings — Minutes — Petitioner's complaint that minutes of the meetings were inaccurate could not stand — Before minutes were confirmed, petitioner's representatives had opportunity to object to or offer corrections or amendments but did not do so*

A group of doctors decided in late 1978 or early 1979 to establish a private hospital and incorporated a company ('the company') towards achieving this aim. Due to lack of technical expertise and business experience, the doctors had to find a suitable partner for their venture. The second and third respondents ('the Antah Group') agreed to offer their expertise in the development of the project. The doctors incorporated a private company limited by shares, ie the petitioner, to represent their interests in the company. Initially, the petitioner held 51% of the shares in the company whilst the Antah Group held the remainder. Subsequent developments saw the company's share capital increasing. Due to complications faced by the project, it was decided that the first respondent would be invited to be a shareholder and a new shareholders' agreement was entered into to regulate the relationship of the shareholders of the company. This agreement resulted in the subsequent dilution of the petitioner's equity ratio to 21% and control of the company being effectively placed in the first and third respondents' hands.

Further complications and changes in the economic situation of the country rendered the project no longer viable and the Antah Group sought to withdraw from the venture and offered to sell their shares to the petitioner. The petitioner had at that time also failed to pay for the arrears on shares allotted to them and to the third

respondent, whose shares the petitioner had agreed to pay for. This put the company into serious financial trouble resulting in its main asset, a piece of land which was to be the site of the hospital, being attached and sold to satisfy the company's creditors. However this was not sufficient to satisfy all of the debts and two remaining creditors (the thirteenth and fourteenth respondents) issued separate notices under s 218 of the Companies Act 1965 ('the Act') seeking to wind up the company. This course of action was prevented by a court order pending the trial of this petition.

The petitioner sought the intervention of the court pursuant to s 181(1)(a) and (b) of the Act complaining that it had been misled, betrayed and cheated in that:

(a) its legitimate expectations of getting a hospital was not fulfilled despite the representations of the Antah Group;
(b) its only investment in the company, the land which was the proposed site and which also represented their contribution to the company's capital, was lost; and
(c) the first, second and third respondents, acting through their representatives, the fourth to eleventh respondents, had not been honest and fair in their dealings over the implementation of the project but had instead worked against the interests of the petitioner by promoting their own interests by awarding contracts to companies related to them.

Held, dismissing the petition:

(1) To establish a case under s 181(1)(a), the petitioner must show that the affairs of the company were being conducted or that the powers of the fourth to eleventh respondents as directors of the company were being exercised in a manner oppressive to or in disregard of the petitioner's interests as a shareholder of the company. Whilst the word 'oppression' connotes more serious or culpable behaviour, something less than oppression is required for conduct that is unfairly discriminatory or prejudicial to the petitioner as a member of the company. The essence of the wrong done to the minority member under s 181(1)(b) is the 'unfairness' of the discrimination or prejudice suffered by the member resulting from some act of the company in the advancement of its objectives. Mere discrimination against or prejudice to such a member is insufficient to attract the court's jurisdiction to intervene. The question of unfairness is one of fact and degree which sub-s (1)(b) requires the court to determine. The petitioner had failed to identify and prove 'oppression' and 'disregard' under s 181(1)(a) of the Act and neither could the petitioner show 'prejudice' or 'unfair discrimination' within s 181(1)(b) of the Act.
(2) The second and third respondents had lived up to their assurances or representations of finding the necessary finances for the project but the fact that such finances did not materialize was not due to their failure to obtain them in the first place. Faced with the

economic slow-down, it was not unreasonable to expect the first and second respondents to take the drastic step of abandoning the project, as that was a decision based on their expertise in their assessment of the market conditions. Since there was no evidence to suggest anything sinister in that decision, no impropriety can be attached to the decision to abandon the project.

(3) The conduct of the petitioner in readily executing the shareholders' agreement and its willingness to give up its controlling shares in the company were in themselves sufficient testimony for the court to conclude that whatever was done that enabled the second respondent, and later on the first respondent, to have complete control of the company, was done with the full and conscious knowledge of the petitioner. They cannot now complain that just because the affairs of the company were in the complete control of the first and second respondents, they had been oppressed or disregarded or unfairly prejudiced as they had agreed to such an arrangement in the first place.

(4) The petitioner's complaint that several companies of which the second and third respondents had vested interests were awarded contracts under the project thus amounting to a breach of fiduciary duty rendering those contracts highly improper and unfairly prejudicial to the petitioner was not a valid one as the award of those contracts were made in circumstances where the interests were disclosed and done with the knowledge of the petitioner and it did not raise any objection to them prior to the petition.

(5) The appointment of the thirteenth respondent as construction manager of the project by a letter of appointment issued by the fourth respondent in breach of a board directive that the fifth respondent was to issue the letter could not be considered as unfairly prejudicial to the petitioner as the issuing of the appointment letter was merely an administrative act. The appointment of the fourteenth respondent as contractor for the superstructure of the hospital, though also done in breach of company procedure as it was outside the scope of the director's authority, could not be oppressive or unfairly prejudicial to the petitioner either as the breach committed was a personal act of a director of the company and as such was not a wrong attributable to the company. The company can look to the director to remedy the wrong committed by him but in itself this could not form the basis of an act oppressive to the petitioner nor could it be regarded as unfairly prejudicial.

(6) The petitioner's complaint that the minutes of the meetings held by the board of directors and the project committee were inaccurate could not stand. The evidence showed that there was a clear procedure adopted by the company in the taking down of the minutes of meetings. Before the minutes were confirmed, the petitioner's representatives at those meetings had the opportunity to object to or offer corrections or amendments to them but did

not do so. Furthermore the petitioner was relying on the accuracy of the minutes to support its petition. It could not therefore blow hot and cold by disputing the accuracy of the minutes at the same time.

[Bahasa Malaysia summary

Sekumpulan doktor telah membuat keputusan pada lewat 1978 atau awal 1979 untuk menubuhkan sebuah hospital swasta dan telah memperbadankan sebuah syarikat ('syarikat itu') untuk mencapai tujuan ini. Akibat kekurangan kepakaran teknikal dan pengalaman perniagaan, doktor-doktor itu terpaksa mencari pekongsi yang sesuai untuk usaha niaga mereka. Responden kedua dan ketiga ('Kumpulan Antah') bersetuju untuk menawarkan kepakaran mereka di dalam pemajuan projek itu. Doktor-doktor itu kemudiannya memperbadankan sebuah syarikat persendirian yang dihadkan dengan saham, yakni pempetisyen, untuk mewakili kepentingan mereka di dalam syarikat itu. Pada mulanya, pempetisyen memegang 51% daripada saham di dalam syarikat itu sementara Kumpulan Antah memegang bakinya. Perkembangan selanjutnya menunjukkan yang saham modal syarikat itu telah bertambah. Oleh kerana kerumitan yang dihadapi oleh projek itu, telah dipersetujui bahawa responden pertama akan dipelawa untuk menjadi satu pemegang saham dan sebuah persetujuan pemegang saham yang baru telah diikat untuk mengawal hubungan di antara pemegang-pemegang saham syarikat itu. Persetujuan itu berkesudahan dengan pencairan nisbah ekuiti pempetisyen kepada 21% dan penguasaan syarikat itu secara berkesan diletakkan di dalam tangan responden kedua dan ketiga.

Kerumitan seterusnya dan pertukaran di dalam keadaan ekonomi negara menyebabkan projek itu tidak lagi berdaya maju dan Kumpulan Antah telah cuba untuk menarik diri daripada usaha niaga itu dan telah membuat tawaran untuk menjual saham-saham mereka kepada pempetisyen. Pempetisyen pada masa itu juga telah gagal membayar untuk tunggakan atas saham-saham yang diuntukkan kepada mereka dan kepada responden ketiga — pempetisyen terlebih dahulu telah bersetuju untuk membayar bagi saham-saham responden ketiga. Ini telah meletakkan syarikat itu di dalam masalah kewangan yang genting yang berkesudahan dengan aset utamanya, sebidang tanah yang bakal digunakan sebagai tapak pembinaan hospital itu, ditahan (attached) dan dijual untuk memenuhi tuntutan pemiutang syarikat itu. Walau bagaimanapun, ini tidak cukup untuk membayar kesemua hutang dan dua orang pemiutang yang tertinggal (responden ketigabelas and keempatbelas) telah mengeluarkan notis-notis yang berasingan di bawah s 218 Akta Syarikat 1965 ('Akta itu') untuk menggulungkan syarikat itu. Tindakan itu telah disekat oleh suatu perintah mahkamah sementara menantikan perbicaraan petisyen ini.

Pempetisyen memohon percampuran tangan mahkamah mengikut s 181(1)(a) dan (b) Akta itu. Pempetisyen mengadu bahawa ianya telah diperdaya, dianiaya dan ditipu kerana:

(a) jangkaan sahnya untuk mendapat sebuah hospital tidak dipenuhi biarpun representasi telah diberikan oleh Kumpulan Antah;
(b) pelaburan tunggalnya di dalam syarikat itu, iaitu tanah yang menjadi tapak yang dicadangkan dan yang mewakili sumbangan mereka kepada modal saham syarikat itu, telah hilang; dan
(c) responden-responden pertama, kedua dan ketiga, bertindak melalui wakil-wakil mereka, yakni responden-responden keempat ke kesebelas, tidak jujur dan adil dalam urusan mereka berkenaan dengan pelaksanaan projek itu tetapi sebaliknya telah bertindak bertentangan dengan kepentingan pempetisyen dengan menggalakkan kepentingan mereka sendiri melalui pemberian kontrak-kontrak kepada syarikat-syarikat yang berhubungan dengan mereka.

Diputuskan, menolak petisyen itu:

(1) Untuk mendirikan suatu kes di bawah s 181(1)(a), pempetisyen mesti menunjukkan bahawa hal ehwal syarikat itu telah dikendalikan atau bahawa kuasa responden keeempat ke kesebelas sebagai pengarah syarikat itu telah dijalankan secara menindas atau tanpa mengendahkan kepentingan pempetisyen sebagai satu pemegang saham syarikat itu. Sedangkan perkataan 'oppression' membawa maksud kelakuan yang lebih serius atau yang bersalah, sesuatu yang kurang daripada 'oppression' dikehendaki untuk kelakuan yang berupa diskriminasi yang tidak adil atau yang memudaratkan pempetisyen sebagai satu ahli syarikat itu. Intisari kesalahan yang dilakukan terhadap ahli minoriti di bawah s 181(1)(b) adalah ketidakadilan akibat diskriminasi atau kemudaratan yang dialami oleh ahli itu yang diakibatkan oleh sesuatu tindakan syarikat itu dalam memajukan tujuan-tujuannya. Diskriminasi terhadap atau kemudaratan semata-mata ke atas seseorang ahli sedemikian tidak mencukupi untuk menarik bidang kuasa mahkamah supaya bercampur tangan. Soal ketidakadilan adalah suatu soalan fakta dan takat yang mengikut seksyan kecil (1)(b) harus diputuskan oleh mahkamah. Pempetisyen telah gagal mengenalpasti dan membuktikan 'oppression' serta 'disregard' di bawah s 181(1)(a) Akta itu. Begitu juga pempetisyen tidak dapat menunjukkan 'prejudice' atau 'unfair discrimination' di bawah s 181(1)(b) Akta itu.

(2) Responden kedua dan ketiga telah memenuhi jaminan dan representasi mereka untuk mencari pembiayaan kewangan yang diperlukan untuk projek itu tetapi hakikat bahawa pembiayaan kewangan sedemikian tidak menjadi kenyataan bukanlah akibat kegagalan mereka memperolehi pembiayaan itu terlebih dahulu. Memandangkan kemerosotan ekonomi, adalah bukan tidak munasabah untuk menjangka responden pertama dan kedua mengambil tindakan drastik meninggalkan projek itu, sebab itulah suatu keputusan berdasarkan kepakaran mereka membaca keadaan pasaran. Oleh kerana tidak terdapat keterangan untuk menyarankan apa-apa yang mencurigakan di dalam keputusan

itu, tiada kesalahan yang boleh diletakkan ke atas keputusan meninggalkan projek itu.

(3) Kelakuan pempetisyen yang segera melaksanakan persetujuan pemegang saham dan kerelaannya melepaskan saham-saham penguasaannya di dalam syarikat itu secara sendirinya merupakan testimoni yang mencukupi untuk mahkamah membuat keputusan bahawa apa yang dilakukan yang membolehkan responden kedua, serta kemudiannya responden pertama, mendapat penguasaan sepenuh syarikat itu, telah dilakukan dengan pengetahuan pempetisyen yang sebenar dan sepenuh. Mereka sekarang tidak boleh mengadu bahawa cuma kerana hal ehwal syarikat itu kini berada di dalam penguasaan sepenuh reponden pertama dan kedua, mereka telah ditindas atau tidak diendahkan atau dimudaratkan secara tidak adil sebab mereka telah bersetuju kepada persetujuan sebegitu dari mula-mula lagi.

(4) Aduan pempetisyen bahawa beberapa buah syarikat, yang di dalamnya responden kedua dan ketiga mempunyai kepentingan terletakhak, telah diberikan kontrak-kontrak di bawah projek itu dan oleh itu membawa kepada kemungkiran kewajipan fidusiari yang menjadikan kontrak-kontrak itu sangat tidak wajar dan mendatangkan kemudaratan yang tidak adil kepada pempetisyen bukannya satu aduan yang sah. Pemberian kontrak-kontrak itu telah dibuat di dalam keadaan di mana kepentingan itu telah didedahkan dan dibuat dengan pengetahuan pempetisyen dan ianya tidak membangkitkan sebarang bantahan kepada kontrak-kontrak itu sebelum petisyen ini.

(5) Perlantikan responden ketigabelas sebagai pengurus pembinaan projek itu melalui sepucuk surat perlantikan yang dikeluarkan oleh responden keempat yang mengingkari satu arahan lembaga pengarah bahawa responden kelimalah yang harus mengeluarkan surat itu tidak boleh diangap sebagai mendatangkan kemudaratan yang tidak adil kepada pempetisyen kerana pengeluaran surat perlantikan itu cuma satu tindakan pentadbiran. Perlantikan responden keempatbelas sebagai kontraktor untuk superstruktur hospital itu, walaupun juga dilakukan dengan mengingkari prosedur syarikat kerana ianya di luar bidang kuasa pengarah, tidak boleh disifatkan sebagai penindasan atau membawa kemudaratan yang tidak adil kepada pempetisyen kerana keingkaran yang dilakukan itu adalah tindakan peribadi seorang pengarah syarikat itu dan oleh itu bukanlah satu kesalahan yang boleh dikatakan berpunca daripada syarikat itu. Syarikat itu boleh bertindak terhadap pengarah itu supaya memulihkan kesalahan yang telah dilakukannya itu tetapi dengan sendirinya ini tidak boleh membentuk asas bagi satu tindakan yang menindas pempetisyen. Juga tidak boleh dikatakan bahawa ianya mendatangkan kemudaratan yang tidak adil.

(6) Aduan pempetisyen bahawa minit mesyuarat yang diadakan oleh lembaga pengarah dan jawatankuasa projek itu adalah tidak tepat tidak boleh berjaya. Keterangan menunjukan bahwa terdapat

prosedur yang jelas yang digunakan oleh syarikat itu dalam mencatatkan minit mesyuarat. Sebelum minit itu disahkan, wakil-wakil pempetisyen di mesyuarat-mesyuarat itu telah mendapat kesempatan untuk membantah terhadap atau memberikan pembetulan atau pindaan kepada mint itu tetapi tidak berbuat demikian. Lagipun, pempetisyen telah bergantung kepada ketepatan minit itu untuk menyokong petisyennya. Lantaran itu ia tidak boleh membuat bantahan terhadap ketepatan minit itu pada masa yang sama.]

[*Editorial Note*: The petitioner has appealed to the Supreme Court vide Civil Appeal No 02–666–93.]

Notes

For cases on the rights of members, see 3 *Mallal's Digest* (4th Ed) paras 108–129.

For a case on the minutes of a meeting, see 3 *Mallal's Digest* (4th Ed) para 100.

Cases referred to

1 *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227 (refd)
2 *Re HR Harmer Ltd* [1958] 3 All ER 689; [1959] 1 WLR 62 (refd)
3 *Wayde & Anor v New South Wales Rugby League Ltd* (1985) 10 ACLR 87; (1985) 59 AJLR 798 (refd)
4 *Re Postgate & Denby (Agencies) Ltd* [1987] BCLC 8; [1987] PCC 1 (refd)

Legislation referred to

Companies Act 1965 s 181(1)(a), (b), (2)

Sri Ram (*Fiona Bodipalar* with him) (*Sri Ram & Co*) for the petitioner.
Raja Aziz Addruse (*Zainur Zakaria* with him) (*Zainur Zakaria & Co*) for the first to eleventh respondents.

Cur Adv Vult

Siti Norma Yaakob J: This petition is presented under s 181(a) and (b) of the Companies Act 1965 ('the Act') and in essence it contains allegations, both general and specific, that the affairs of the PJ Medical Group Sdn Bhd, the twelfth respondent ('the company'), are being conducted in a manner oppressive or in disregard or unfairly discriminatory or prejudicial to the petitioner. To appreciate the true nature of the petitioner's complaints and the issues raised, it is necessary that I state the factual background of such complaints and the roles played by the different respondents cited in this petition.

In late 1978 or early 1979, a group of 25 doctors got together and decided to establish a private medical centre offering a high standard of

A medical, surgical and nursing care to the public at the lowest cost possible. With that very noble intention, the doctors incorporated the company on 8 May 1979, as a private company limited by shares, as the vehicle to launch their business venture.

The initial issued and paid-up capital of the company was RM4 divided into four ordinary shares of RM1 each and four from the group of doctors B subscribed to the shares and became the first shareholders as well as the first directors of the company. However, events will show that the capital of the company was increased progressively and changes were effected to the personalities of the shareholders and the directors as they were no longer confined to persons of the medical profession.

C On 20 October 1979, the company purchased a piece of land in Petaling Jaya, on which the hospital ('the project') was to be constructed and the purchase price of RM218,694 was raised and paid for by the doctors. This land was later capitalized and formed the doctors' contribution to the company's share capital.

D After this, the company appointed two professionals, Messrs Goh Hock Guan & Associates, a firm of architects, to draw up the plans for the project, as well as Messrs Kassim Chan & Co, accountants and project consultants, to do a feasibility study of the project. These appointments were made in early 1980.

With the plans from the architects and the feasibility study report from E the project consultants, the doctors approached a number of financial institutions for loans to finance the development of the project which, at that time, was envisaged to be in the region of RM3m–RM4m, but their efforts were in vain as the financial institutions were not prepared to place the responsibility of managing the finances of the project in the hands of laymen like the doctors. They were more than prepared to finance the F project if it was managed by persons specially skilled in the construction and building industry and in financial management.

Apart from obtaining the finances for the project, the doctors also realized that there were other obstacles for which their expertise was most inadequate. The first of these related to the obtaining of early approval for G a change in the use of the land, as the title contains an express condition that the only building to be erected on the land must be one approved by the Majlis Perbandaran Petaling Jaya (MPPJ) to the Teachers Association of Malaya, the previous owners. Thus this express condition had to be changed to enable the doctors to allow a private hospital to be built on the H land and the doctors envisaged that there would be a delay in getting such an approval.

The other obstacle was the obtaining of the approval for the building plans and although they had not yet submitted the building plans to MPPJ, they foresaw that left to their own devices, delay was inevitable.

It was under these circumstances that the doctors started looking around I for a suitable partner for the project. An approach was made to the second respondent, which was then a private investment company belonging to the Royal Household of Negeri Sembilan, and, with the blessings of His Royal Highness the Yang di-Pertuan Besar of Negeri Sembilan, the second

respondent, together with another related family company, the third respondent, agreed to offer their expertise to the doctors in the development of the project.

It was a condition of their participation that the third respondent were to be given free shares in the company and that the doctors would pay for those shares as well as for subsequent increases. The second and third respondents ('the Antah Group') are represented by the fourth and fifth respondents, who were and still are the directors of the Antah Group. All matters relating to the project were to be managed by a project committee made up of representatives from the doctors as well as representatives of the Antah Group.

It was at one of the first recorded meetings of the project committee held on 29 April 1980, that the following were agreed upon:

(1) The equity ratio in the company was restructured so as to allow the doctors to hold 51% of the shares through a company to be formed and the remaining 49% by the Antah Group. It was following this arrangement that the petitioner was incorporated on 22 October 1980, as a private company limited by shares. All the shareholders are members of the medical profession practising varied specialities. Thus any reference to the doctors hereafter shall also include the petitioner and vice versa.

(2) The full board of the company would consist of nine members, five to represent the doctors and the remaining four to represent the Antah Group's interests, and the chairman of the board shall be an Antah Group nominee. Following this, appointments to the board were made even though there was no allotment of shares to the Antah Group and as at 4 November 1980, the directors of the company were:

(1) Dato' Dr Radhakrishnan Menon, PW1;
(2) Datin Dr Leela Menon;
(3) Dr George Devanayagam Ananda;
(4) Dr Khaw Joo Hua;
(5) Dr Ng Chuan Wan;

who represented the five doctors on the board;

(6) the fourth respondent, DW1;
(7) the fifth respondent;
(8) Mr Colin Francis; and
(9) Mr N Sahadevan.

The last four represented the Antah Group on the board and although they were in the minority, DW1, the Antah Group's nominee, became the chairman of the board.

Although all the directors of the company were appointed by 4 November 1980, the board did not hold any meetings between November 1980 to July 1983. Instead, the project committee met regularly between April 1980 to July 1983 and all such meetings were held at the premises of the second respondent and chaired by DW1.

During this period, the project committee was actively pursuing a course of action aimed at meeting the doctors' expectations. From the minutes of seven meetings attached to the petition, it is clear that the following actions were taken and pursued by the project committee.

(1) *Approval for change in land use*

This was obtained by 10 June 1980, through the expertise and influence of one Dato' Wan Salaidin, a retired civil servant and a former state secretary, who was brought in by DW1 to obtain the approval from the Selangor Executive Council. That left the project committee with one other major approval to be obtained, ie the submission and approval of the building plans.

(2) *Purchase of the nurses' land*

The project committee realized that there was insufficient car parks for the project and to accommodate this, there was a proposal to purchase the land adjacent to the company's land. An approach was made to the Nurses' Association, the owners of the land, but despite negotiations and counter-offers, as the nurses wanted a substitute for their land, the purchase did not take place as, by 30 November 1982, the Association had decided to construct their own headquarters on the land. In any event, the acquisition was not essential for the project.

(3) *Acquisition of the TOL land*

Together with the proposal to purchase the nurses' land, the project committee had also decided to acquire the TOL land, which was behind the nurses' land, to provide not only a bigger area for the project but also to provide sufficient space for car parks. Dato' Wan Salaidin was given the responsibility to get the necessary approval for the TOL land. However, nothing came out of this proposal as, first, it was realized that it was not possible for planning purposes to incorporate parking space on the TOL land and, secondly, the approval of its alienation to the company never came from the state government.

(4) *Revision of building plans*

Although there were already building plans drawn up by the architect, Mr Goh Hock Guan, who had been employed by the doctors, nonetheless the project committee engaged the services of Mr Robert Trew, a hospital consultant from England, to vet and improve on the architect's plans as the former had no experience in the planning and construction of a private hospital. For such services, the company incurred £5,000 as fees and this was settled as it was a budgeted item.

This appointment also involved a revision of the plans and following the restriction of the use of the TOL land, the plans were further revised to include car parking space in the building. Pending such revision, attempts to obtain loans from various financial institutions were kept on hold although

the project committee received feedback that a number of banks showed interest in the project.

The directors of the company met for the first time as a board on 26 July 1983, and I shall now deal with the actions taken by the board from that date until 24 January 1985. I list them as follows:

(a) Appointment of general manager and project managers

Mr Risha Rajadurai, an Antah Group nominee, was appointed the general manager to oversee the day-to-day operations of the company and in this respect he submitted progress reports to the board who would then discuss the reports at the board meetings. He was replaced by Mr Low Yat Seow, another Antah Group nominee, on 27 March 1985.

At the same time, the board appointed Bicon-DG Jones Sdn Bhd as project managers, to co-ordinate the works of the architect, the contractor and the other consultants and to supervise the construction of the project on behalf of the company. Later, Bicon-Jones also evaluated tenders and made recommendations to the management committee and to the board.

(b) Capital increases and share allotments

It was during this period that the company's initial capital of RM4 was increased progressively, and with each increase, new issues of shares at par were allotted to the doctors as well as to the Antah Group and in respect of the shares allotted to the third respondent, they were all paid for by the doctors. However, in relation to the equity ratio, the doctors still maintained the same majority of 51% as against the Antah Group of 49%.

(c) Appointment of Sodeteg

Although there was already a feasibility study undertaken by Messrs Kassim Chan & Co, the board, on 28 October 1983, appointed a French consulting company, Sodeteg, to do another feasibility study of the project. Sodeteg's report, A–1, which was submitted in December 1983, contained, inter alia, three main features:

(1) It put the costs of the project, inclusive of medical equipment, at RM38m, which was well beyond the board's estimation.
(2) It suggested changes in the designs of the project which were not apparent in the architect's drawings.
(3) It proposed a turnkey contract for the implementation of the project, fully equipped to their redesigned plans, at the cost of RM42m.

Out of these three matters, only one proposal was accepted by the board, ie the incorporation of Sodeteg's designs into the architect's drawings. This involved amending the building plans which, by December 1983, had already been approved by MPPJ but subject to the pre-condition that construction had to commence by 8 August 1984.

The amended drawings incorporating Sodeteg's designs were only resubmitted to MPPJ on 7 August 1984, and in order to meet the deadline of the building approval, the board appointed a local contractor to do some preliminary works on the land, like clearing the land, uprooting trees and

erecting hoardings and sign boards. The company paid RM11,180 to the contractor.

MPPJ approved the amended drawings in November 1984.

At the same time, the board negotiated with Sodeteg to reduce the costs of the project but when Sodeteg refused to budge, their services were terminated in November 1984. The company paid RM730,708 to Sodeteg as fees.

(d) Appointment of RMJM Teknikal (M) Sdn Bhd

They are mechanical and electrical consultants and they were appointed as project advisors on 14 March 1984, to evaluate the proposals put up by Sodeteg for the agreed fee of RM62,000. However, with the passage of time, they had put in additional work and they demanded a RM35,000 fee increase. After negotiations, the board approved an increase of RM15,000 and the total amount paid out by the company to RMJM Teknikal as fees came to RM77,000.

It is not disputed that a cousin of DW1 and the fifth respondent control this company.

After the services of Sodeteg were terminated, the board felt that the company could still complete the project at the cost of RM35m with a local contractor. It was under these circumstances that the first respondent, a construction and development company, in which DW1 was and still is a director, was invited by DW1 to be a shareholder of the company and on 24 January 1985, a shareholders' agreement was entered into between the first, second and third respondents and the petitioner to regulate their relationship as shareholders of the company. Between 1985 to 1987, with every increase of the company's capital, the company allotted new issues of shares at par to the company's four shareholders, the petitioner, first, second and third respondents, and as at 17 March 1987, when this petition was presented, out of an authorized capital of RM15m, 6,616,720 shares had been issued and paid up and held by the shareholders as follows:

The petitioner holds 1,406,250 shares representing	21%
First respondent holds 2,850,000 shares representing	43%
Second respondent holds 2,216,720 shares representing	33%
Third respondent holds 143,750 shares representing	3%

Under art 4 of the shareholders' agreement, the board of directors of the company consisted of eight members, three to be appointed by the first respondent (they being the sixth, eighth and ninth respondents), three by the Antah Group (they being DW1, the fifth and seventh respondents) and two by the petitioner (they being PW1 and Dr George Devanayagam Ananda). The tenth respondent was the alternate director to DW1 whilst the eleventh respondent was the alternate director to the seventh respondent, DW2, and, as such, both the tenth and eleventh respondents represented the interests of the Antah Group on the board of the company.

Under art 6 of the shareholders' agreement, the board of directors appointed a management committee comprising of two directors of the company, they being the appointees of the first and second respondents,

and the general manager to conduct matters relating to finance and management and to monitor the project. This committee was vested with powers delegated to it by the board. The doctors had no representative on the management committee. All the directives of the management committee were tabled before the board and their decisions made known to the board. DW2 became the chairman of the management committee with powers to award any contract below RM50,000. For contracts falling within RM50,000–RM1m, only the full management committee had the power to award such contracts, and above RM1m, only the full board could award such contracts.

There was also a medical committee set up under art 7 of the shareholders' agreement to oversee all the medical, surgical and nursing aspects of the project and was also charged with the responsibility of deciding the medical equipment to be purchased. The five members of this committee were all doctors, with PW1 as the chairman. The only non-medical person on the committee was the secretary, he being the general manager of the project as well as the secretary of the management committee.

From the documentary evidence, it is very clear that after January 1985, the company's objectives were managed by:

(1) the board of directors who had the final say in the decision-making process; and
(2) the management committee who conducted the day to day operations of the company and who implemented the board's decisions.

Between the period of February 1985 to January 1987, the board made a number of decisions and awarded a number of contracts to companies whose appointments are now being questioned by the petitioner. I list the decisions and appointments as follows:

(i) The appointment of I & P Fletcher Binaan Sdn Bhd, the thirteenth respondent.

This appointment was made by the board on 9 July 1985, and the thirteenth respondent became the construction manager for the project. They were one of six tenderers short-listed by the management committee and although the project manager, Bicon-Jones, recommended Teamwork Corp Sdn Bhd, another short-listed tenderer, the contract went to the thirteenth respondent because of their experience. The thirteenth respondent's revised fee was agreed at RM2,060,300 but on top of this, an additional fee of RM958,770 was approved by the board as the thirteenth respondent provided the common services as well. However, when the services of the thirteenth respondent were prematurely terminated on 28 April 1986, the company agreed to settle their fees at RM473,933 which remains unpaid to this date.

It is not disputed that the sixth, eighth and ninth respondents were the directors of the thirteenth respondent at the material time.

(ii) The appointment of Designworkshop Sdn Bhd

The board appointed them on 11 December 1985, to be in charge of the interior designing of the project for a fee of RM107,000. However, when

their contract was prematurely terminated, the company paid them RM23,100 in 1986 for work done on the drawings of the design.

It is not disputed that DW1's wife controls this company.

(iii) Appointment of Antah Schindler Sdn Bhd

On 13 February 1986, a letter of intent was issued to Antah Schindler for the installation of lifts to the project despite Bicon-Jones' recommendation that the contract for the lifts be awarded to Otis Elevator. When the project was abandoned, the company accepted Antah Schindler's claim of RM37,709 as cancellation charges but no payment has been made to date.

(iv) Appointment of Antah Biwater Sdn Bhd

Like Antah Schindler Sdn Bhd, Antah Biwater Sdn Bhd was also issued with a letter of intent on 26 February 1986, for waste treatment, and like Antah Schindler, Antah Biwater claimed cancellation charges totalling RM28,038 when the contract was terminated on 28 April 1986, but no payment has been made by the company.

By their very names, both Antah Schindler and Antah Biwater are related to the Antah Group.

(v) Appointment of Somikon Sdn Bhd, the fourteenth respondent

The fourteenth respondent was one of ten companies who were invited to tender for the superstructure contract. Of the ten, only eight, including the fourteenth respondent, tendered and two interviews were conducted by Bicon-Jones, the first with the four lowest tenderers, namely:

(1) Sun-Sun Construction Engineering and Construction Sdn Bhd;
(2) Seloga Jaya Sdn Bhd;
(3) Mampu Jaya Sdn Bhd/Syarikat Manong Sdn Bhd; and
(4) Metrobilt Construction Sdn Bhd.

Bicon-Jones recommended Metrobilt and the joint venture of Mampu Jaya/Manong.

At the request of the management committee, Bicon-Jones also conducted a second interview with two other tenderers, the fourteenth respondent and Bandar Builders Sdn Bhd, but in the end, DW2 directed that the superstructure contract be awarded to the fourteenth respondent and on 17 January 1986, the contract of RM4,719,802 was offered and accepted by the fourteenth respondent.

Although the fourteenth respondent took possession of the site on 20 January 1986, they were slow in commencing work and by 20 March 1986, they stopped work altogether.

Another reason why work at the site was suspended was because the board was seriously considering the alternative of purchasing an established hospital, Subang Jaya Medical Centre (SJMC) from United Estates Project Bhd, a subsidiary of Sime Darby Sdn Bhd. However, the proposed acquisition was shelved by the board on 17 July 1986, as it felt that such a venture at that point of time was not feasible. At the same time, the board resolved to defer the project to a later period due to poor market conditions.

Dissatisfied, the doctors proposed that the company be allowed to develop the land and lease the premises to them. This proposal did not meet with the majority of the board.

Matters came to a head in January 1987, when the Antah Group decided to withdraw from the company and offered their shares to the doctors and it became very apparent that the project was being abandoned altogether. At the same time, calls were made to the doctors to pay up for arrears of all shares allotted to the petitioner and the third respondent amounting to RM983,280. The petitioner refused to pay and as a result, the company's finances were in a very bad shape and were insufficient to meet the demands of three creditors, the thirteenth and fourteenth respondents and Sum Cheong, the contractors engaged to do the piling and sub-structure works. Sum Cheong attached the company's land and it was subsequently auctioned for RM2.8m on 20 December 1989. The proceeds were sufficient to settle Sum Cheong's debt in full but not that due to the thirteenth and fourteenth respondents. Both the thirteenth and fourteenth respondents issued separate s 218 notices dated 5 March 1987 and 20 February 1987, respectively, but by an order of the court, the thirteenth and fourteenth respondents were restrained from presenting any winding-up petition against the company until the trial of this petition.

It is against this background that the petitioner now complains that it had been misled, betrayed and cheated, in that:

(1) its legitimate expectation of getting a hospital has not been fulfilled despite representations made by the second and third respondents;
(2) its only investment in the company is lost; and
(3) the first, second and third respondents acting through their representatives, the fourth to eleventh respondents, have not been honest and fair in their dealings over the implementation of the project but had, instead, worked against the interests of the petitioner by promoting their own interests through companies related to them.

It is based on these complaints that the petitioner invoked s 181(1)(a) and (b) of the Act, seeking the court's intervention for remedies to be specified upon the determination of the petitioner's complaints.

Section 181 of the Act, as is applicable to this case, reads as follows:

> Remedy in cases of an oppression.
>
> (1) Any member or holder of a debenture of a company ... may apply to the Court for an order under this section on the ground —
>
> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members ... or in disregard of his or their interests as members, shareholders ..., or
>
> (b) that some act of the company has been done or is threatened or that some resolution of the members, ... or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members ... (including himself).

A (2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit ...

This section has been specially enacted to give a remedy to minority shareholders in limited companies who are being oppressed or disregarded B or where some acts have been done by the companies which unfairly discriminate or prejudice the minority shareholders.

The scope of s 181(1)(a) and (b) was discussed by the Privy Council in the case of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung*[1] when it traced its descent from s 210 of the United Kingdom Companies Act 1948 and its rather wider resemblance C to s 186 of the Australian Companies Act 1951. The Privy Council also made the following observations:

(1) that s 181 differs from its predecessors in that it is notably wider in scope than the United Kingdom section; and

(2) that under s 210 of the United Kingdom Companies Act 1948, the D court is required to find not only that the facts justify the making of a winding-up order under the 'just and equitable' provision in the Act but also that to wind up the company would unfairly prejudice the oppressed minority. Our Malaysian section, on the other hand, requires (under sub-s 1(a)) a finding of 'oppression' or 'disregard' and then E leaves to the court a wide discretion as to the relief which it may grant, including the winding-up of the company.

Their Lordships then stressed the importance 'that courts applying s 181 should do so according to its terms and its purpose and should not regard themselves as necessarily bound by United Kingdom decisions which are F based upon a different section and in some cases restrictive. The same applies, though with less force, to reliance upon Australian decisions upon s 186'. It is for this very reason that I cannot accept the contention of Mr Sri Ram, senior counsel for the petitioner, that the just and equitable grounds form part and parcel of s 181, for unlike s 210 of the UK Companies Act 1948, our s 181 does not specify the winding-up of a company on the G just and equitable ground. That provision would be more relevant if this petition had been presented under s 218(1)(i) of the Act.

Dealing with s 181(1)(a) specifically, the Privy Council then proceeded to lay down the following guidelines as to how a complainant can invoke that subsection:

H The complainant must identify and prove 'oppression' or 'disregard'. The mere fact that one or more of those managing the company possess the majority of the voting power and, in reliance upon that power, make policy or executive decisions with which the complainant does not agree, is not enough. Those who take interest in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in I disregard of their interests, that the section can be invoked.

Thus to establish a case under s 181(1)(a), the petitioner must show that the affairs of the company are being conducted or that the powers of the fourth to eleventh respondents as directors of the company are being

exercised in a manner oppressive to or in disregard of the petitioner's interests as a shareholder of the company.

A number of authorities were cited to show how the English courts dealt with the question of oppression when s 210 of the UK Companies Act 1948 was invoked. Thus in *Re HR Harmer Ltd*,[2] the father, an autocratic octogenarian, who had founded the company and retained voting control, was deemed to be oppressive when he ran the business of the company as if it were his private domain. He also ignored and insulted his co-directors who were his sons, disregarded board resolutions and generally acted arbitrarily in the affairs of the company.

As it is quite impossible to lay down categories of conduct considered to be oppressive, each case has to be examined in the light of its own particular facts and thus the particular types of conduct complained of in the cases cited merely tend to illustrate whether such conduct can be regarded in law to be oppressive. From those cases, it is sufficient for me to conclude that oppression does not necessarily mean illegal or fraudulent nor does it require fraud. For there to be oppression, there must be a visible departure from the standard of fair dealing or fair play and where the oppressed is constrained to submit to some overbearing act or attitude on the part of the oppressor. Similarly, 'disregard involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or set at naught the proper company procedure', per Lord Wilberforce in *Re Kong Thai Sawmill*.[1]

Whilst the word 'oppression' connotes more serious or culpable behaviour, something less than oppression is required for conduct that is unfairly discriminatory or prejudicial to the petitioner as a member of the company. The essence of the wrong done to the minority member under s 181(1)(b) is the 'unfairness' of the discrimination or prejudice suffered by the member resulting from some act of the company in the advancement of its objectives. Mere discrimination against or prejudice to such a member is insufficient to attract the court's jurisdiction to intervene. The question of unfairness is one of fact and degree which sub-s (1)(b) requires the court to determine. The test is aptly stated by Brennan J in the Australian case of *Wayde & Anor v New South Wales Rugby League Ltd*,[3] to be as follows:

> The test of unfairness is objective ... and it assumes that reasonable directors weigh the furthering of the corporate object against the disadvantage, disability or burden which their decision will impose and address their minds to the question whether a proposed decision is unfair. The court must determine whether reasonable directors possessing any special skill, knowledge or acumen possessed by the directors and having in mind the importance of furthering the corporate object on one hand and the disadvantage, disability or burden which their decision will impose on a member on the other, would have decided that it was unfair to make that decision.

It is this concept of unfair discrimination or prejudice that enables the court to take into consideration not only the rights of the members under the company's constitution but also their legitimate expectations arising from

agreements and understanding of the members among themselves. *Re Posgate & Denby (Agencies) Ltd.*[4]

Having stated the law, I shall now consider whether the specific complaints of the petitioner fall within the categories of oppression, disregard, unfair discrimination or prejudice.

Complaint No 1 relates to the failure of the second and third respondents to fulfil the representations they made through their representatives, the fourth and fifth respondents, that they, the second and third respondents would provide the finance and complete the project at whatever cost and it is this failure which has now deprived the petitioner of its legitimate expectation of getting a hospital.

It is PW1's testimony that between 1980–1984, when the second and third respondents became partners of the project, they had assured him that because of their standing in the corporate world, they could easily obtain bank loans for the project and should they fail to do so, they would come up with the finance themselves.

All the minutes of the project committee meetings held between the period 29 April 1980 to 30 November 1980, contain an item on 'Finance', where matters relating to the financial projections and the avenues where such financing could be obtained were discussed at each meeting by all the shareholders of the company, including the petitioner. PW1 has also admitted that as early as February 1981, there was an offer of a term loan of RM6m from Bank Bumiputra Malaysia Bhd but the project committee decided not to accept the offer at that point of time as the financial aspects of the project were still in its initial stage.

The same financial considerations feature prominently at all the board meetings conducted during the period 26 July 1983 to 19 December 1984. DW1 also testified that in April 1984, when the Sodeteg report was submitted to a number of local and foreign banks, their responses were positive for so long as their loans were secured. However, with the withdrawal of Sodeteg, the costing of the project had to be readjusted and this resulted in all applications for loans being kept on hold. Nonetheless the board had already agreed to appoint Asian International Merchant Bankers Bhd as the managing agent for the syndication of a term loan with not more than four participating banks.

Following the first respondent's entry as a shareholder of the company in 1985, there was a concerted effort by the board to finalize the costs of the project which was to include the costs of the medical equipment as well. In this respect, there is the unchallenged evidence of DW1 that applications for loans were submitted to various banks but the applications were not processed further as, by July 1986, with the recession getting worse by the day, the board considered the project to be no longer viable and it then decided to abandon it altogether in January 1987.

I am satisfied that from the evidence, both oral and documentary, the second and third respondents had lived up to their assurances or representations of finding the necessary finances for the project but the fact that such finances did not materialize was not due to the failure of the

second and third respondents to obtain them in the first place, but was due to other factors beyond the control of the respondents. A

But what about the assurances or representations which PW1 claims were made by the second and third respondents that they would complete the project at all costs from their own funds?

DW1 denies ever giving such assurances and as they were alleged to have been made orally, unsupported by any other evidence, I have to consider the surrounding circumstances as to whether such assurances or representations were in fact uttered. B

It must be remembered that it was PW1 who sought the participation of the second and third respondents as partners or joint venturers to the project, as on their own, the doctors had no money to put up the hospital. C It must also be remembered that on their own, the doctors had approached Asian Merchant Bankers, Public Bank and the Hongkong & Shanghai Banking Corp for loans but their applications were turned down as they did not have the technical know-how to manage the financing of a major project. Thus the participation of the second and third respondents was based solely on their ability to provide their experience and expertise D particularly in the providing of financial and business acumen which the doctors lacked. How the second and third respondents would go about finding the finances was to approach banks and other financial institutions for loans which they had done.

With the execution of the shareholders' agreement on 24 January 1985, E the relationship of the petitioner, the first, second and third respondents as joint venturers or partners to the project were governed by the terms and conditions of the agreement. The agreement made no mention of the fact that alternative financing would be undertaken by the second and third respondents in the event that they were unsuccessful in obtaining loans from banks and other financial institutions. On the contrary, art 16 provided F for the supercession and cancellation in all respects of all previous agreements and undertakings, if any, between them, whether given orally or in writing. Thus if the petitioner was led to believe that the second and third respondents would provide the financing themselves, that belief cannot now be used against the second and third respondents in view of art 16. In any event, the G question as to whether the second and third respondents had to come up with their own funds never arose as the project was deferred in July 1986 and abandoned completely in January 1987.

At that point of time, it is accepted by all parties that the country was experiencing a severe recession and, as such, it was unreasonable to expect the first, second and third respondents to embark on a project which was no H longer feasible much less dish out funds of their own if indeed there was an obligation to do so on the part of the second respondent. It is true that recession or no recession, people continue to get sick and that hospitals are in demand but that is not the issue here. What is being questioned is whether the respondent directors had acted fairly in abandoning the project I altogether.

Faced with the economic slow-down, it is not unreasonable to expect the first and second respondents to take the drastic step of abandoning the

project, as that was a decision based on their expertise in their assessment of the market conditions. Since there is no evidence to suggest anything sinister in that decision, no impropriety can be attached to the decision to abandon the project.

Complaint No 2 forms part of the petitioner's objection that the second respondent, and later the first respondent, had complete control of the company.

At the initial stage of their joint venture, the relationship of the petitioner with the second respondent was based purely on mutual trust and confidence. Between April 1980 and December 1984, all decisions on the project were made firstly by the project committee and later the board, and the petitioner was represented on both the project committee and the board. At that point of time, the doctors held the controlling shares but nonetheless they readily agreed to DW1 becoming the chairman of the company. PW1 also admitted that from the very beginning, the management, finance and the development of the project were left in the hands of the second respondent, no doubt in keeping with the very purpose of the second respondent's participation.

It is this arrangement which singles out this case as being rather unique and different from the position of the minority shareholder who has been totally disregarded or excluded from the management of the company and where decisions taken by the majority are completely without the knowledge and much less for the benefit of the minority.

However, this arrangement did not have the effect of shutting out the petitioner altogether, as from the minutes of the project committee meetings and board meetings, all decisions taken by the company were discussed and decided in the presence and full knowledge of the petitioner's representatives. They had every opportunity to voice their objections if they wanted to, but there is no evidence to show of any strong protests recorded from them nor is there any evidence to show that they were in any way prevented from doing so.

Following the first respondent's entry as a shareholder of the company, the petitioner's equity ratio in the company was diluted and since the very intention of the first respondent's participation was that they would be the local contractors to develop the project, the control in the management, financing and development of the project was also extended to the first respondent. The conduct of the petitioner in readily executing the shareholders' agreement (there is nothing to suggest any coercion) and its willingness to give up its controlling shares in the company are in themselves sufficient testimony for me to conclude that whatever was done that enabled the second respondent, and later on the first respondent, to have complete control of the company, was done with the full and conscious knowledge of the petitioner. The petitioner's representatives may very well be laymen in the field of high finance and in the building industry but they are by no means uneducated or not knowledgeable as they possess the highest skill in the particular fields of medicine that they practice. Thus they must to some degree have known the full extent and consequences of their actions. It is for this very reason that they cannot now complain that just because the affairs of the company were in the complete control of the first and second

respondents, they had been oppressed or disregarded or unfairly prejudiced as they had agreed to such an arrangement in the first place. A

Complaint No 3 deals with the petitioner's allegation that although represented on the board of the company, it was powerless to object to the actions taken by the fourth and fifth respondents.

As I have indicated earlier, from the period April 1980 to December 1984, the doctors were the majority shareholders in the company and in that privileged position, there was nothing to prevent them from outvoting any action taken by the fourth and fifth respondents which they considered to be in any way oppressive or unfairly prejudicial to their interests. They failed to do so and since there is no evidence to show that they had been prevented from exercising their majority vote, they cannot now complain that they were powerless to do so. However, after 1985, the doctors no longer commanded the majority vote, a situation brought about with their full knowledge and consent, and that being the case, they have to abide by the majority rule. B C

Complaint No 4 relates to the petitioner's allegation that though their representatives were in a position to voice disagreements with actions taken or proposed by the fourth and fifth respondents, they did not do so in order not to breach an oral undertaking reached with the first and second respondents that in all matters of management including finance, the second respondent was to have the authoritative say. D

This complaint ties up with Complaints No 2 and 3 and the oral undertaking given by the petitioner's representatives on the project committee and on the board that all matters of management, finance and development of the project were to be left to the representatives of the Antah Group. Under the shareholders' agreement, that same oral undertaking is expressed and embodied in cl 6.01(i). Under these circumstances, the question of there being a breach of such undertaking does not arise, as they had given their unconditional approval to the first and second respondents to have the authoritative say in all management matters including finance. In any event, the manner in which DW1 and the other respondent directors went about implementing the board's decisions was not to exclude the petitioner's representatives altogether, as their views were sought and before any decision was taken, it was explained to them and they had full knowledge of the decision taken. E F G

Complaint No 5 relates to the period between January 1985 to January 1987, when several companies in which the first and second respondents had an interest, were given contracts in the project in circumstances which show a breach of fiduciary duty. H

For this complaint, the appointments of the following companies are being attacked:

(1) the thirteenth respondent, who became the construction manager of the project;
(2) Designworkshop Sdn Bhd, who provided the interior designing for the project; I
(3) Antah Schindler Sdn Bhd, who were to install the lifts for the project; and

(4) Antah Biwater Sdn Bhd, who were to provide waste treatment services to the project.

The objection to the thirteenth respondent's appointment stems from the approval of an additional fee of RM958,770 payable to the thirteenth respondent for the schedule of common services provided by them over and above the contract price of RM2,060,300. The petitioner contends that the charging of the additional fee was highly improper and an utter waste of money, as it was led to believe that the only fees payable to the thirteenth respondent would not exceed the contract price.

DW1 explains that common services refer to the usage of heavy equipment, like cranes, that are brought to the site by one contractor to be used commonly by other contractors engaged to do different works at the site. By providing such common services at the site, the prices quoted by the other contractors would be less and to that extent is a saving factor to the company. In this instance, the thirteenth respondent provided such common services after their contract as construction manager was entered into and, since such services did not form part and parcel of the subject matter of the contract, I see nothing improper in the approval of the extra charge for services rendered subsequent to the execution of the contract.

The appointment of Designworkshop Sdn Bhd, although objected to by the petitioner as being improper in its petition, was subsequently admitted by PW1 as being proper and I say no more of that appointment. Likewise, the appointments of Antah Schindler and Antah Biwater, for which no evidence of impropriety or dishonesty has been adduced.

In this respect, the petitioner argues that what is being questioned is the entry of the contracts with the related companies, not the fairness or unfairness of the contracts so entered. I consider this argument to be irreconcilable, as the only reason why there is now a strong objection to the entering of the contracts is because of the element of vested interest ensuing from the relationship of the respondent directors with the companies concerned. It is this element of vested interest that renders such contracts to be highly improper and unfairly prejudicial to the complainant.

I would readily accept such contracts to be so if they had been awarded to the companies in circumstances which are suspicious or without the knowledge of the petitioner. In this instance, the appointments were made openly, the interests of the first respondent and the Antah Group were disclosed to the doctors and they did not raise any objection at all. Under those circumstances, since the contracts were awarded with the acquiescence and co-operation of the petitioner, there is no ground for any cause of complaint.

Complaint No 6 has reference to the allegations that DW1, a director of the first, second and third respondents, did not sufficiently discharge his duties as a director of the company.

The first of the many actions taken by DW1, which is now being questioned, is the appointment of Sodeteg. The French company was brought in by DW1 to do a feasibility study of the project. PW1 contends that such a study was unnecessary as there was already a report of a feasibility study done by Messrs Kassim Chan & Co and that the appointment

of Sodeteg would delay the project and increase the costs. His fears were justified when a year after the appointment, the board rejected A–1, Sodeteg's report and terminated Sodeteg's services. A

PW1's perception of Sodeteg's appointment is not altogether correct. To begin with, DW1 may well have introduced Sodeteg but it was the board that appointed the French company to prepare a second feasibility study. When cross-examined, PW1 admitted that A–1 was a more extensive report than the one prepared by Messrs Kassim Chan & Co. B

There is also evidence to show that certain proposals contained in A–1 were adopted and incorporated into the building plans, these being the designs of the project that were not apparent in the architect's drawings. Added to this is the fact that A–1 was used by the fifth respondent in the submissions for loans to local and foreign banks and these banks responded positively to the applications. As such, I consider that PW1's allegations that A–1 was thrown overboard as being irrelevant to be totally misplaced, particularly when the only reason why Sodeteg's services were terminated was because of their refusal to reduce their quoted price of the project which the board considered to be prohibitive. C D

Another complaint is that the inclusion of Dato' Wan Salaidin by DW1 as a member of the project committee did not hasten the obtaining of approvals on land matters but, on the contrary, delayed the project, particularly when no approval at all was received on the acquisition of the TOL land. E

It must be remembered that Dato' Wan Salaidin was brought in to provide the element of influence because of his past connections to the Selangor State Government when he was the state secretary. PW1 admitted that as far as the approval for the conversion of the use of the company's land was concerned, that came early enough. Likewise, there is no objection to the obtaining of the approval for the building plans. F

As for the TOL land, its acquisition was necessary so that it could provide the parking space for the hospital. Without it, underground car parks had to be provided within the hospital complex itself and this would unnecessarily incur high costs for the project. Thus the building plans were drawn incorporating the idea that the TOL land would eventually be acquired following Dato' Wan Salaidin's participation and influence. G

There is evidence to show that MPPJ received the company's application for the TOL land but without referring it to the State Executive Council, MPPJ rejected it in the mistaken belief that the same land had already been applied for by the Sultan of Selangor on behalf of the Association for Spastic Children. However, when this mistake was discovered, MPPJ promised to submit the application to the State Executive Council. That was the situation in April 1981. In November 1982, the board was informed that it was not possible for planning purposes to incorporate car parking space on the TOL land and this restriction necessitated a revision of the building plans. Thus as at that date, the petitioner was already aware that even if the approval to acquire the TOL land was given at all, it could not be used as a parking space, the very intention why the TOL land was required. Under these circumstances, I consider that Dato' Wan Salaidin H I

had done whatever he could to get all the necessary approvals but the fact that he failed to get the TOL land alienated to the company was not due to any lack of trying on his part and to that end, DW1's decision to include him as a member of the project committee was not a decision that had unfairly prejudiced the petitioner in any way.

I now turn to Complaint No 7 which is an allegation that there had been a departure from company procedure when DW1 acted contrary to a directive of the board authorizing the fifth respondent to issue the letter of appointment to the thirteenth respondent as the construction manager for the project. The letter was instead issued by DW1.

Both DW1 and the fifth respondent are directors of the company and the fact that it was DW1, and not the fifth respondent, who signed the letter of appointment cannot affect the validity of such an appointment as to render such appointment unfairly prejudicial to the petitioner. It is true that DW1 acted contrary to a board directive but considering his status and position as the chairman and director of the company and what he did was purely an administrative act to implement a board directive relating to an administrative matter, I do not consider that such a departure from company procedure has unfairly prejudiced the petitioner in any way.

Another instance of departure from company procedure cited by the petitioner is the award of the superstructure contract to the fourteenth respondent.

It is not disputed that DW2, the chairman of the management committee, directed the superstructure contract to be given to the fourteenth respondent. He admitted that he had no authority to do so, as the amount of the contract did not fall within the authority of the management committee, much less his authority as a director, to award. Rightly, the authority to award the superstructure contract lay with the board of directors of the company. Clearly DW2 had committed a breach of the normal company procedure and the issue is whether such a breach was oppressive to the petitioner or had unfairly prejudiced it in any way.

The breach in this instance was committed by the personal act of a director of the company and, as such, it cannot be attributed to a wrong done by the company. The company can look to DW2 to remedy the wrong committed by him but in itself cannot form the basis of an act oppressive of the petitioner nor can it be regarded as being unfairly prejudicial. Furthermore, the award of the superstructure contract was an administrative act and a management matter, the responsibility for which lay with the management committee as agreed to by the petitioner under art 7.01 read with the Third Schedule of the shareholders' agreement. As such, if there is anybody who should complain about the breach, it is the company itself and not for the petitioner to regard the breach as being oppressive or unfairly prejudicial to it.

Finally, I come to Complaint No 8 that the minutes of the project committee meetings and board meetings attached to the petition do not reflect what was actually discussed or decided at such meetings.

From the evidence, it is very clear that the procedure adopted by the company in the taking down of minutes of meetings conducted by the

project committee and the board of directors is the normal and accepted procedure of recording what was actually discussed and decided at such meetings. It is not a verbatim report as such but a summary of what had actually taken place. At the end of each meeting, the minutes would be drawn up and circulated to all the members of the project committee and the board and tabled again at the subsequent meeting of the committee or the board when members are invited to correct any error or substitute any mistake or add any matter which has been left out of the minutes. It is only upon such amendments being done that the minutes are confirmed and form part of the records of the company.

Going through the minutes, this confirmation exercise is listed as the second item at such meetings and PW1 is all too aware of his right to offer any corrections or any amendments if he had wanted to. He only exercised that right once in respect of the minutes of the board meeting held on 6 January 1987, and by failing to raise any objection to the minutes that had already been confirmed and attached to the petition, he cannot now be heard to say that the minutes do not reflect what was actually discussed or decided. To allow him to plead so would make a mockery of what had already been accepted and confirmed and render such minutes valueless. On one hand, the petitioner relies on the minutes to support its petition but, on the other, considers them to be an inaccurate record of what had transpired at the meetings. In this respect, the petitioner cannot blow hot and cold.

Considering all the evidence in its totality, it is my considered opinion that no case under s 181(a) or (b) of the Act has been made out by the petitioner. On the particular facts of this case, whatever decisions taken by the respondent directors in the management of the company were done openly and with the full knowledge of the petitioner. The petitioner's representatives were not sleeping partners as such and being highly knowledgeable persons, they had willingly entrusted the management, finance and the development of the project to the first and second respondents. Under these circumstances, whatever was done by the respondent directors was with the consent and acquiescence and co-operation of the petitioner. In themselves, the acts or decisions of the various respondents can hardly be described as being oppressive or unfairly discriminatory or prejudicial to the petitioner and on that finding, I accordingly dismiss this petition with costs.

Petition dismissed.

Reported by Joseph Lim Tim Lee